RECORD AND BRIEFS

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In the Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
fka Group Health Plan, Inc.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici law professors (listed in Appendix A) are leading scholars and teachers of constitutional and administrative law who submit this brief in their individual capacities, not on behalf of their institutions. They study and write on federal preemption of state law, including the ways in which courts can and should discipline agencies to consider federalism values. *Amici* have an interest in promoting judicial review that requires agencies to take state regulatory interests seriously when their rules would preempt state law. *Amici* submit this brief to demonstrate that Petitioner's view of judicial deference to agency preemption would encourage agencies to ignore state interests when adopting broad interpretations of federal statutes to preempt state law.[1]

Amici have a range of views on how federalism affects the analysis required by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But all agree that agency preemption is not subject to ordinary *Chevron* deference without close judicial review of the agency's interpretation or consideration of the presumption against preemption. Some *amici* would place questions of preemption outside *Chevron*'s domain unless Congress has expressly authorized an agency to interpret a preemption provision. Thus,

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein.

agency positions on federalism would be treated only under the regime of *Skidmore v. Swift*, 323 U.S. 134 (1944). Other *amici* would require agencies to consider federalism, subject to searching judicial review of the quality of the agency's decisionmaking at *Chevron* Step Two or under arbitrary-and-capricious review. *Amici* share the concern that any framework for judicial review of agency preemption must ensure that the usual balance between state and federal authority is respected; this includes acknowledgment that Congress should be clear when it chooses to displace state law. But Petitioner's proposed framework would effectively eliminate that presumption against preemption whenever an agency interprets an express preemption provision. This broad view of agency authority is not mandated by this Court's precedents and risks disrupting the constitutional distribution of federal and state authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether an agency has the authority to preempt state law is a matter of considerable importance in an era where states and federal agencies share authority within virtually all fields of regulation. The Federal Employee Health Benefits Act ("FEHBA") includes a "puzzling" preemption provision that raises this question anew:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued

> thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1); *see Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006) (explaining that Section 8902(m)(1) is a "puzzling" provision "open to more than one construction"). The State of Missouri, like the vast majority of states, has long regulated contractual subrogation or reimbursement clauses in personal injury cases. The Office of Personnel Management ("OPM"), however, promulgated a rule concluding that Section 8902(m)(1) gives preemptive effect to subrogation clauses in FEHB contracts. 5 C.F.R. § 890.106(h). In a single sentence, OPM incorrectly concluded its rule had no new federalism impacts. Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery, 80 Fed. Reg. 29,203 (May 21, 2015). Invoking *Chevron* deference, Petitioner argues that OPM's interpretation of the scope of FEHBA's preemption provision is authoritative.

This is not a case for *Chevron* deference. In reviewing OPM's interpretation, this Court should take into account that Congress "legislates against the backdrop of certain unexpressed presumptions," including "those grounded in the relationship between the Federal Government and the States." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). This Court's precedents demonstrate that federalism has always disciplined a court's analysis of administrative action that displaces state law.

As this Court explained in *McVeigh*, 547 U.S. at 698, Section 8902(m)(1) is ambiguous, "puzzling," and warrants a "modest reading." Facing active litigation in

state and federal courts over the provision's meaning, OPM issued a rule that read Section 8902(m)(1) broadly to preempt state laws that would "prevent or limit subrogation or reimbursement rights under FEHB contracts." 80 Fed. Reg. at 29,203. And in so doing, the agency did not consider the wisdom of displacing state authority in tort law and insurance law, areas of traditional state concern. Instead, OPM offered a boilerplate assurance that its "rule restates existing rights, roles and responsibilities of State . . . governments." *Id.* at 29,204.

Deferring to OPM under *Chevron* would encourage agencies to preempt state law without regard to the usual balance between state and federal authority. Judicial review should at a minimum discipline agencies to consider federalism values. Agencies do not have special expertise to decide preemption questions. *Chevron* itself explained that deference is merited because agencies have political accountability and policy expertise to "reconcil[e] conflicting policies," and have "more than ordinary knowledge" of the "force of the statutory policy in the given situation." *Chevron*, 467 U.S. at 844 (citations omitted). When it comes to preemption, however, agencies must reconcile their own interests in national uniformity with structural and constitutional concerns presented by federalism. Courts' "ordinary knowledge" encompasses these federalism concerns. Judicial review of agencies' preemptive action can and should discipline agencies to consider federalism and protects states' regulatory interests where agencies fail to do so.

OPM's rulemaking *confirms* the need for searching judicial review of agency preemption. The agency

offered no analysis of the wisdom of displacing the usual balance between state and federal authority in the regulation of torts and insurance contracts. Far from being authoritative, the agency's rule does not embody the sort of reasoned judgment that might warrant judicial deference.

This Court, therefore, should reject the approach to judicial review offered by the Petitioner and its *amici*. Under their approach, courts would give only a cursory review to an agency's interpretation of a statute's preemption clause under *Chevron* Step Two. *See* Pet'r Br. 45-46; U.S. Br. 24. As a result, neither the agency nor a federal court would be required to give meaningful consideration to states' regulatory interests or the constitutional balance of state and federal authority. *See* Pet'r Br. 45; U.S. Br. 23-24. On their view of this Court's precedents, OPM's perfunctory discussion of federalism appears to be followed by perfunctory judicial review.

This Court, however, has always conducted a searching review to ensure that agency preemption is consistent with congressional intent. It has consistently applied the presumption against preemption in cases where an agency's interpretation of a statute tests the boundaries of its delegated authority. Indeed, this Court has counseled that an analysis of an ambiguous preemption provision should begin with the presumption and that interpretation of FEHBA's preemption provision in particular should be a "modest" one—a view that OPM does not even appear to have considered. *McVeigh*, 547 U.S. at 698. Petitioner and its *amici* invite this Court to break new ground by giving strong *Chevron* deference to OPM's

broad and unreasoned vision of FEHBA preemption. This Court should reject that invitation.

ARGUMENT

I. Judicial Review Is Necessary To Discipline Agencies To Consider Federalism Values.

Under this Court's federalism jurisprudence, statutory interpretation is one of the safeguards of the allocation of authority between state and federal governments. When interpreting statutes, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides . . . the usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations and quotation marks omitted). As this Court has explained, Congress "legislates against the backdrop of certain unexpressed presumptions," including "those grounded in the relationship between the Federal Government and the States." *Bond*, 134 S. Ct. at 2088 (citations and quotation marks omitted). Against this backdrop, structural and political safeguards play a vital role in maintaining the constitutional balance between states and the federal government. Federalism-based presumptions reinforce these safeguards and thus help preserve state authority.

This Court has yet to specify how it might review an agency's preemptive interpretation of federal law while maintaining respect for "the States [as] independent sovereigns in our federal system." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Petitioner and its *amici* would eliminate consideration of the crucial "backdrop" of federalism-based presumptions that

Congress takes for granted when it legislates and that this Court routinely applies when interpreting the preemptive scope of a federal statute. *See Bond*, 134 S. Ct. at 2088. This Court's jurisprudence does not mandate the Petitioner's approach, which would upset the usual federal-state balance in an era where there is pervasive overlap between the authority of states and that of federal agencies.

A. Agencies Do Not Have Special Expertise In Assessing The Constitutional Balance Of Federal And State Powers.

Petitioner and the United States assume that an agency's policy expertise necessarily extends to evaluating the limits that federalism places upon federal agency action. Pet'r Br. 43; U.S. Br. 10. To the contrary, an agency's authority to implement federal regulatory programs is no guarantee of competence to determine the proper balance of federal and state law.

Whether an ambiguous statute should be interpreted to preempt state law implicates more than technical questions of federal regulation or the convenience of national uniformity that preemption provides. To be sure, agencies have a role to play in assessing how state law may affect federal regulation. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000). Although the allocation of authority between the state and federal governments is not a technical question, federal agencies implementing federal regulation day in and day out may have special insight into "how state law affects the regulatory scheme." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). And, in some cases, a federal agency's dependency upon states for the success of a specific regulatory program may

encourage the agency to consider state regulatory interests. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L.J. 2023, 2075 (2008). But setting policy at the federal level does not train regulators to understand the "overall distribution of government authority and the intrinsic value of preserving core state regulatory authority." Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 742 (2004); *see also* Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008).[2] Nor does determining federal policy provide any unique insight into the meaning of state law. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 755 (2008). In contrast, courts routinely grapple with these structural concerns.

Judicial review of agency preemption is thus critical to ensure consideration of state interests and federalism values and to preserve the balance between state and federal authority in an era where there is significant federal agency presence in areas of traditional state authority. Federal agencies are not necessarily accountable to the states. *See* Young, *Executive Preemption*, *supra*, at 889. And national uniformity will always be convenient; agencies will always have good reason to prefer the low cost of implementing one standard instead of many. *See* Health Insurers Br. 15-27. Judicial review, then, is needed to ensure that agencies consider a state's

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[2] Agencies' programmatic focus means they may "excel on . . . pragmatic variables," while "fall[ing] short" on constitutional questions "concerning the division of authority between the federal government and the states." Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 755 (2008).

regulatory interests and is necessary to ensure that preemption is consistent with congressional intent and constitutional values.

Such was the case in *Wyeth*, where this Court rejected the Food and Drug Administration's ("FDA's") conclusion that its approval of drug labels preempted state tort law. 555 U.S. at 581. The FDA had failed to consider the value added by local regulation, including that state law may "offer an additional, and important, layer of consumer protection that complements [agency] regulation." *Id.* at 579; *see* David C. Vladeck, *Preemption and Regulatory Failure Risks*, *in* Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question 54, 56 (William W. Buzbee ed., 2009) (explaining that state tort law provides a "safety net" that a federal agency cannot itself provide). In rejecting the agency's preemption statement, this Court "identif[ied] state law as a mechanism to guard against federal agency failure." Gillian Metzger, *Federalism and Federal Agency Reform*, 111 Colum. L. Rev. 1, 30 (2011).[3]

Given these general principles, how should the Court review the regulation at issue here? The answer is with caution.

One need look no further than the OPM's federalism impact statement in this case to understand why. The OPM's statement gives no reason to think that it has

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[3] This Court was similarly concerned with federal agency failure and overreach in other recent preemption decisions. Metzger, *Agency Reform*, *supra*, at 27-28 (discussing *Altria Group Inc. v. Good*, 555 U.S. 70 (2008), and *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009)).

special expertise in determining preemption questions. Its consideration of federalism was a boilerplate assertion that its rule did not have new federalism impacts, but instead "restate[d]" the existing allocation of state and federal authority. 80 Fed. Reg. at 29,204. OPM's 2012 opinion letter to health insurance carriers was similarly conclusory, containing no analysis of state interests in preemption. Instead, OPM merely stated the following: "OPM has consistently recognized that the FEHBA preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts, and we continue to maintain this position." FEHB Program Carrier Letter No. 2012-18, at 2 (June 18, 2012), available at https://www.opm.gov/healthcare-insurance/healthcare/carriers/2012/2012-18.pdf. Thus, the OPM has consistently failed to address states' regulatory interests when explaining its position on FEHBA preemption.

This perfunctory treatment of federalism may be unsurprising. The OPM's charge is to recruit and to manage the federal workforce. *See, e.g.*, 5 U.S.C. § 8901 et seq. As a workforce manager, OPM has an obvious interest in the convenience, not to mention the policymaking authority, that comes with preemption of state law.[4] But it does not have a "mandate to represent state interests." Young, *Executive*

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[4] This Court expressed a similar concern in *King v. Burwell*, 135 S. Ct. 2480 (2015): "It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. . . . This is not a case for the IRS." *Id.* at 2489 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006)) (Roberts, C.J.).

Preemption, *supra*, at 878. And its federalism impact statement smacks of the very kind of "tunnel vision" that judicial review is designed to correct. *Cf.* Merrill, *supra*, at 755 (explaining that a "critical problem" with agency preemption "is one of tunnel vision"); Mendelson, *Preemption*, *supra*, at 784 (explaining that agency "federalism impact analyses," though required by executive order, "are scarce at best"); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 228 (2007) (discussing "agency momentum towards increased preemption"). Thus, OPM's rulemaking underscores the need for close judicial review to ensure the proper state-federal balance of authority.

This Court should not adopt an approach to judicial review that requires deference whenever an agency promulgates a rule that recites an interest in national uniformity. If administrative federalism is to remain a reality, judicial review must discipline agencies to take federalism values seriously.

B. Courts Should Incorporate Federalism Values Into The Framework For Review Of Agency Preemption.

Petitioner and its *amici* would sweep away these concerns with a simple invocation of the OPM's authority to promulgate regulations and the purportedly overriding concern for national uniformity. In their view, the presumption against preemption, a bedrock rule of statutory interpretation, is not relevant where Congress has enacted a preemption provision and given an agency general authority to adopt regulations. *See* Pet'r Br. at 36; Chamber's Br. at 5;

U.S. Br. at 11. Instead, they argue, *Chevron* requires this Court to defer to the OPM's boilerplate assessment of federalism.

To the contrary, this Court has explained that "*Chevron* deference . . . is not afforded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). This Court has always required that an agency have delegated authority to resolve an ambiguity—a lesson only "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. United States Army Corp of Eng'rs*, 531 U.S. 159, 173 (2001). Indeed, federalism concerns have consistently driven this Court's view of agency preemption.

1. According to Petitioner and its *amici*, an agency has authority to issue a binding rule preempting state law as long as the enabling statute refers to preemption and the agency has general authority to promulgate rules. Pet'r Br. 43; U.S. Br. 22. Their proposed rule is far too sweeping and misconstrues this Court's precedent.

This Court's preemption jurisprudence has analyzed agency preemption against the backdrop of federalism. *Cf. Bond*, 134 S. Ct. at 2088 (explaining that Congress "legislates against the backdrop of certain unexpressed [federalism-based] presumptions"). Several of its cases, such as *Wyeth*, analyze the statutory scheme in fine detail, with the Court assuring itself of the scope of the statute's preemptive power while giving an agency's views the weight their reasoning deserves, if any. *See Wyeth*, 555 U.S. at 576-77 (explaining that Court has

"attended to an agency's explanation of how state law affects the regulatory scheme" but has "not deferred to an agency's conclusion that state law is preempted").[5] What the Court has not done is adopt a framework that would make federalism concerns irrelevant to judicial review of agency preemption.

When confronted with an express preemption clause in *Watters v. Wachovia*, 550 U.S. 1 (2007), the Court did not defer to the agency under *Chevron*. The district court had given *Chevron* deference to the Comptroller General's preemptive interpretation. *Id.* at 10. But this Court independently concluded that state law stood as an obstacle to federal banking law and therefore was preempted. *Id.* at 20. When invoking implied preemption, this Court treated the close

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[5] Some scholars have proposed this type of clear-statement rule to limit *Chevron*'s domain in preemption cases. *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 699 (2008) (arguing for clear-statement requirement to confer broad preemptive power on agencies); Merrill, *supra*, at 767 (same). Other scholars have argued that federalism concerns are better addressed with close judicial review under the *Chevron* framework or under arbitrary-and-capricious review. *See* Metzger, *New Federalism*, *supra*, at 2104-2105 (arguing that great weight should be placed on quality of agency's reasoning); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L.J. 1933, 2011-12 (2008). The common thread is that the Court's preemption jurisprudence supports searching review of agency preemption. *See Wyeth*, 555 U.S. at 576-581; Metzger, *Agency Reform*, *supra*, at 17-18. This Court need not specify where federalism concerns enter the *Chevron* framework to resolve this case. *See infra* Pt. II.

question as one for careful judicial review to determine whether Congress intended to preempt state law.[6]

Similarly, this Court in *Gonzales v. Oregon* declined to defer to an agency's attempt to preempt state law based upon the federalism impacts. It denied both *Auer v. Robbins*, 519 U.S. 452 (1997) and *Chevron* deference to the Attorney General's interpretive rule that would have revoked the licenses of local doctors who prescribed drugs to assist patients with suicide. *Gonzales*, 546 U.S. at 268. *Gonzales* turned in part on the Court's conclusion that it need not accord heightened deference to the Attorney General's view because he had not followed the procedures mandated by the Controlled Substances Act. *Id.* at 256. But the central issue in the case, the Court explained, was one of "[w]ho decides whether a particular activity is 'in the course of professional practice' or done for a 'legitimate medical purpose.'" *Id.* at 257 (citing the statute, 21 U.S.C. §§ 802(21) and 829(c)). Allowing the Attorney General to define those terms would hand "a single executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." *Id.* at 275. *Gonzales*, then, counseled that

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[6] OPM relied upon express preemption and Section 8902(m)(1) in its rulemaking. Nevertheless, the United States as *amicus* now offers that OPM's preemption decision was also based upon Section 8902(d)'s references to "benefits offered" and "limitations," which OPM did not mention at all in its rulemaking. U.S. Br. at 22. Petitioner does not, however, press a claim of implied preemption, which would be distinct from the theory of express preemption that OPM actually advanced. *Cf. Watters*, 550 U.S. at 21 (holding that statute impliedly preempted state law and not reaching the question of an express preemption clause's scope).

courts should carefully assess the scope of agency's delegated authority whenever a rule threatens to sweep away an area of traditional state regulation.

In short, this Court has not applied ordinary *Chevron* review to hold that an agency's preemptive interpretation of an ambiguous federal statute is authoritative. Petitioner and its *amici* focus upon this Court's decision in *City of Arlington, Tex. v. F.C.C.*, but, by this Court's reasoning, that case "ha[d] nothing to do with federalism." 133 S. Ct. 1863, 1873 (2013). The Petitioner also makes much of this Court's decision in *Cuomo v. Clearing House Association, LLC*, 557 U.S. 519 (2009). Pet'r Br. 52. But the Court in *Cuomo* concluded, after a detailed statutory analysis, that the statute clearly foreclosed the agency's construction. *See* 557 U.S. at 536. If anything, *Cuomo* "suggests that more authorization of administrative preemption than simply an express preemption clause is needed for the agency's views on preemption to get strong deference." Metzger, *Agency Reform*, *supra*, at 14 n.53.

2. The presumption against preemption demands more searching judicial review than the Petitioner's proposed framework would direct. This Court has long recognized that "Congress does not cavalierly pre-empt state law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Out of respect for "the States [as] independent sovereigns in our federal system," *id.*, courts should "start with the assumption that the historic police powers of the States were not . . . superseded by [a statute] unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption — that Congress knows to speak plainly

when it chooses to displace state power— must ground "all pre-emption cases." *Id.*

The presumption against preemption vindicates values at the heart of this Court's federalism jurisprudence.[7] It ensures that decisions to preempt state law rest ultimately with Congress, whose intent is the "ultimate touchstone" of preemption analysis. *Wyeth*, 555 U.S. at 565 (internal quotation marks omitted). As this Court explained in *Gregory v. Ashcroft*:

> [I]nasmuch as this Court in *Garcia* [*v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-54 (1985)] has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

501 U.S. 452, 464 (1992). The presumption against preemption thus disciplines Congress to consider federalism values before preempting state law. See William N. Eskridge, *Vetogates,* Chevron, *Preemption*, 83 Notre Dame L. Rev. 1441, 1471 (2008) (noting that the presumption allows courts to ensure that Congress has adequately deliberated before preempting state law). The same should be true of agencies implementing Congress's regulatory statutes.

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[7] *See generally* Ernest A. Young, *"The Ordinary Diet of the Law": The Pre-sumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 257-60 (2011) (tracing the development of the presumption against preemption as it fits into the Court's broader federalism jurisprudence).

This Court has invoked the presumption far more often than the "occasional articulation" suggested by Petitioner's *amici*. Chamber's Br. at 5. This includes cases examining the scope of an express preemption clause. In *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 516 (1992), this Court relied upon the presumption when interpreting an express preemption provision, with Justice Blackmun explaining in his concurring opinion that "[w]e do not, absent unambiguous evidence, infer a *scope* of preemption beyond that which clearly is mandated by Congress' language." *Id.* at 533 (emphasis added). The Court invoked the presumption when it concluded that a statute's express displacement of state safety standards for medical devices did not extend to a state claim of defective design. *See Medtronic*, 518 U.S. at 485. It relied on its "basic" "duty to accept the reading that disfavors preemption" in construing a provision that plainly prohibited states from adopting certain types of labeling requirements for pesticides. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). And in *Altria Group v. Good*, this Court explained that "when addressing questions of *express* or implied pre-emption," courts should "begin their analysis" by "assum[ing]" that a Congressional intent to preempt must be "clear and manifest." 555 U.S. 70, 77 (2008) (emphasis added).

Petitioner and its *amici* urge this Court to eliminate the presumption against preemption in express preemption cases. Pet'r Br. at 36; Chamber's Br. at 8; U.S. Br. at 11. First, they argue that the Court has already held in *Puerto Rico v. Franklin California Tax-Free* Trust, 136 S. Ct. 1938 (2016), that the presumption is not relevant when interpreting an

express preemption provision. There, the Court explained that it would "not invoke any presumption against pre-emption," but did so after explaining that "the plain text of the Bankruptcy Code [could] begin[] and end[] [its] analysis." *Id.* at 1946. Thus, other tools of statutory construction may sometimes lead to a definitive answer on the question of a preemption provision's scope. But it does not follow that the presumption is "irrelevant." See Pet'r Br. at 36. Even where "federal law contains an express pre-emption clause, . . . the question of the substance and scope of Congress' displacement of state law still remains." *Altria*, 555 U.S. at 76.[8]

The statutory interpretation issue in this case is a good example why the presumption against preemption is relevant to questions of the scope of an ambiguous express preemption provision. FEHBA's preemption provision makes clear that Congress intended a federal contract to preempt state laws that differ on the types of covered medical care. That is the plain import of Section 8902(m)(1)'s preemption of state laws that "relate to the nature, provision, or extent of coverage or

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[8] *Franklin Trust* relied upon *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011), which said simply that courts "focus on the plain wording of the [preemption] clause," without considering the role of presumptions if that wording is not plain, and upon *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 946 (2016), which simply found the presumption against preemption displaced by longstanding interpretations of the ERISA statute. None of these cases purported to overrule *Altria* or *Bates*. It is incorrect, then, to say that the presumption is never triggered when this Court confronts an ambiguous express preemption clause. *See* U.S. Br. at 11. At the very least, this Court has not definitively foreclosed its application in express preemption cases.

benefits." 5 U.S.C. § 8902(m)(1); *see* H.R. Rep. 95-282, 5 (1977) (explaining that provision would preempt state laws "which specify types of medical care"). But Congress did not make clear whether it intended FEHB contracts to preempt state regulation of subrogation. *Cf.* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 272 (2011) ("The clarity of Congress's intentions with respect to negligent design hardly establishes that Congress also meant to preempt claims for negligent manufacture . . . ."). The presumption against preemption remains relevant to resolving that second, logically distinct question.

The presumption can warrant a modest reading of a statute's preemptive scope. It is one of the "context-specific[] factors" that courts use to assess ambiguous delegations, including how a broad interpretation of an otherwise opaque provision might intrude on state authority. *See Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring); Miriam Seifter, *Federalism at Step Zero*, 83 Fordham L. Rev. 633, 650 (2014) ("canons are applied *contextually*"). It is just this sort of "modest reading" that this Court applied to Section 8902(m)(1) in *McVeigh* but OPM failed to consider it in its rulemaking. *See McVeigh*, 547 U.S. at 698; *infra* Part II.A.

Second, *amicus* Chamber of Commerce contends that the presumption "cannot be justified on federalism grounds" and is inconsistent with the original understanding of the Supremacy Clause. Chamber's Br. at 4. It would follow that the presumption has no role to play in this Court's treatment of OPM's preemptive interpretation of the FEHBA. But the

presumption against preemption is firmly rooted and helps preserve the federal-state balance in the modern administrative state. *See Bond*, 134 S. Ct. at 2088 (Congress legislates against backdrop of federalism-based presumptions); *cf.* Young, *Presumption*, *supra*, at 324 ("courts can give effect to the Framers' original understanding of the Supremacy Clause . . . without rejecting [the presumption against preemption]"). In our "era of administrative federalism," federal regulatory policy plays an encompassing, perhaps even "outsized" role. Seifter, *supra*, at 635. The simple fact is that federal and state regulators occupy many, if not all, of the same regulatory spaces. The presumption against preemption plays an important role in ensuring that federal administration does not swallow administrative federalism.

II. The OPM's Preemptive Interpretation Is Not Due Deference.

In its preemption cases, this Court has exercised independent judgment on the question of preemption, even if it "attend[s] to" the agency's views and whatever weight they deserve. *Wyeth*, 555 U.S. at 576-77. It has not, however, treated an agency's preemptive interpretation as authoritative under ordinary *Chevron* review. The Court should not break new ground by in this case deferring to the OPM's interpretation. Deferring to the OPM would encourage federal agencies to disregard state interests when interpreting ambiguous statutes.

Federal agencies, no less than federal courts, should not lightly construe federal statutes to preempt state law. Whatever OPM's expertise in managing the federal civil service, it did not display any expertise in

considering federalism values. As this Court had already explained, a "modest reading" of the FEHBA's "puzzling" preemption provision "is in order." *McVeigh*, 547 U.S. at 697-98. The OPM instead adopted a broad interpretation of the preemption provision in anticipation of litigation. And in doing so, the OPM failed entirely to consider federalism values. This Court should not defer to the OPM's attempt to preempt state tort law and regulation of insurance.

A. State Regulation Of Reimbursement and Subrogation Reflects Important State Regulatory Interests.

The OPM's explanation of its broad interpretation of the FEHBA's preemption provision gives no account of the reasons behind Missouri's anti-subrogation law.[9] The agency's explanation amounted to this: "The interpretation of Section 8902(m)(1) promulgated herein comports with longstanding Federal policy and furthers Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." 80 Fed. Reg. at 29,203. Recognizing that "[s]ome state courts have interpreted ambiguity in Section 8902(m)(1) to reach a contrary result," the agency applied its new rule not only to future cases, but also to pending ones. *Id.*

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[9] OPM's failure to consider state regulatory interests in its rulemaking precludes this Court from relying upon any *post hoc* assessment of them in reviewing OPM's preemptive interpretation. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) ("It is not the role of the courts to speculate on reasons that might have supported an agency's decision." (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Petitioner and its *amici* similarly are silent on a state's interests in regulating reimbursement and subrogation. But an understanding of state subrogation policies is crucial to assessing the preemption question in this case. The agency's lack of appreciation for the value of state policy making in this area underscores why a "modest reading" of FEHBA's preemption provision is appropriate and why this Court should not treat OPM's interpretation as authoritative. *McVeigh*, 547 U.S. at 698.

Missouri's anti-subrogation law is part of an ongoing dialogue among states regarding the regulation of tortious wrongs and health insurance. Missouri's rule is not an outlier. Not only Missouri, but over half of states limit an insurer's right to subrogation or reimbursement. *See* E. Farish Percy, *Applying the Common Fund Doctrine to an ERISA-Governed Employee Benefit Plan's Claim for Subrogation or Reimbursement*, 61 Fla. L. Rev. 55, 57, 65-66 (2009). As one of Petitioner's *amici* points out, Missouri is not the only state that prohibits subrogation. *See* Health Insurers Br. at 15-16 (citing Ariz. Rev. Stat. § 12-565; Conn. Gen. Stat. Ann. § 52-225a; N.J. Stat. Ann. § 2A: 15-97; N.Y. Gen. Oblig. Law § 5-335(a); 11 N.C. Admin. Code § 12.0319; Va. Stat. § 38.2-3405; *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 419 (Mo. Ct. App. 1965); Kan. Admin. Regs. § 40-1-20). States that have limited or prohibited reimbursement and/or subrogation have done so as an exercise of their traditional authority to provide for the health, safety, and welfare of their residents.

Subrogation or reimbursement clauses in health insurance contracts allow the insurer to recover its

costs when an insured individual has recovered, or has a right to recover, from a third party. Traditionally, subrogation was not favored under the common law, which prohibited "assigning" or "splitting a cause of action." Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. Rev. 237, 239 (1996). Missouri's court of appeals followed this consistent public policy when it held in 1965 that reimbursement or subrogation clauses in insurance contracts were invalid in a personal injury case. *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 424 (Mo. Ct. App. 1965). To permit subrogation would, the court explained, "lift[] the lid on a Pandora's Box crammed with both practical and legal problems." *Chumbley*, 394 S.W.2d at 425.

States have enunciated several public policy rationales for limiting or prohibiting subrogation and reimbursement. First, as the Missouri court of appeals noted, subrogation and reimbursement may "not, *in fact*, work a perceptible reduction in the premium charged for such coverage." *Chumbley*, 394 S.W.2d at 425; *see* Baron, *supra*, at 244 ("A number of courts have also come to recognize that the allowance of subrogation results in a pure windfall to the insurer with no corresponding adjustment in the premium charged."). Second, while subrogation is justified as necessary to prevent "double recovery," it may in fact lead to undercompensation; for instance, "items such as mental anguish and physical pain are not insurable and are rarely fully recoverable from tortfeasors." Baron, *supra*, at 245. Third, subrogation discourages settlement and can lead to protracted litigation. *See Chumbley*, 394 S.W. 2d at 425; Baron, *supra*, at 246. By prohibiting subrogation, Missouri — as well as the

seven other states that have also prohibited it — have simplified the process of litigation and recovery to protect consumers.

Other states have experimented with alternative solutions to problems that subrogation poses. At least nineteen states have limited subrogation through the "make whole" doctrine. AFHO State Survey of Reimbursement Laws in the Health Insurance Context (Feb. 2014) (cited in Health Insurers Br. at 15).[10] This doctrine holds that "an insurer is not entitled to subrogation unless and until the insured has been made whole for his or her loss." *Complete Health, Inc. v. White*, 638 So. 2d 784, 786 (Ala. 1994). Thus, the majority of states either prohibited or limited subrogation as "the harshness of subrogation . . . came to light." Baron, *supra*, at 261.

State regulation of subrogation is within the states' traditional authority over tort law and insurance law. Decentralized tort law is a "uniquely American" tradition that "has held up remarkably well." Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 Ariz. L. Rev. 917, 921 (1996). The assignment or splitting of causes of action for personal injuries was traditionally prohibited at the common law. And the "regulation of insurance, though within the ambit of federal power, has traditionally been under the control of the States." *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 68-69 (1959).

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[10] Available at http://ermerlaw.com/PDFs/Feb2014%20FHOState SurveyWithMap.pdf.

This is not to say that Missouri or any other state is right about the burdens imposed by subrogation, or that OPM is wrong that allowing for it reduces cost in the overall insurance system. The question remains "[w]ho decides." *Gonzales* 546 U.S. at 257. Missouri's anti-subrogation law is part of an ongoing state dialogue about the problems of subrogation, one in which the majority of states have concluded subrogation must be limited or prohibited outright.

In a federal system, the application of the presumption against preemption of state law plays a crucial role in protecting space for those dialogues and in ensuring that these "laboratories of democracy" are not lightly shut down. *New State Ice v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see Oregon v. Ice*, 555 U.S. 160, 171 (2009) (Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems."). Federal agencies such as OPM have no special expertise in considering the constitutional value of state autonomy and interstate dialogue. *See supra* Pt. I.A. As a result, close judicial review is necessary to ensure that agency preemption does not disrupt the usual balance of federal and state authority when Congress has not authorized it to do so.

As this Court has already explained, Congress has not clearly indicated that it intended to authorize OPM-approved contracts to preempt state laws concerning subrogation. In *McVeigh*, this Court reasoned that Section 8902(m)(1) is a "puzzling measure" that "declares no federal law preemptive," but instead gives preemptive effect to terms in an OPM "negotiated contract." 547 U.S. at 697-98. It was "not

prepared to say" that an "OPM-BCBSA contract term would displace every condition that state law places" on reimbursement. *Id.* Instead, the Court concluded that a "modest reading" of Section 8902(m)(1) was appropriate. *See id.* at 698; *cf. CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014) (Kennedy, J., concurring) (explaining that presumption against preemption "support[s]" a "narrow interpretation" of an express preemption provision); *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 145 (2d Cir. 2005) (Sotomayor, J.) (invoking presumption against preemption when interpreting Section 8902(m)(1)).

B. In Adopting A Broad Interpretation Of The Preemption Provision, The OPM Failed Entirely To Consider Federalism Values.

The OPM did not adopt a modest reading of Section 8902(m)(1). Instead, it read the provision to give preemptive effect to subrogation clauses in OPM-approved contracts. According to the agency, these clauses "relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits," not because they prescribe anything with respect to coverage or benefits, but instead because they "lower[] the cost of benefits, and create[] greater uniformity in benefits and benefits administration." Proposed Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery, 80 Fed. Reg. 931, 932 (January 7, 2015); *see also* Final Rule, 80 Fed. Reg. at 29,203 (explaining only that "subrogation recoveries translate to premium cost savings," and saying nothing about its relationship to coverage or benefits). In announcing this broad interpretation, the OPM failed entirely to discuss any

countervailing concerns, much less the federalism values that this Court has made clear are necessary considerations in cases of agency preemption.

In striving to defend OPM's failure to discuss state regulatory interests or countervailing federalism concerns, the Petitioner and its *amici* ask this Court to conduct cursory judicial review at *Chevron* Step Two. On their view, OPM's preemptive interpretation is "authoritative" because OPM promulgated a conclusory rule in 2015 repeating its conclusory view of preemption from a 2012 carrier letter. Pet'r Br. 46. Thus, the Petitioner's approach would not require a reviewing court, much less agencies, to take federalism seriously when determining if preemption is consistent with congressional intent.

Yet OPM's failure to take federalism seriously is the type of agency failure that demands searching judicial review. This Court has already made clear that close judicial review of agency preemption is necessary to maintain the constitutional balance of federal and state authority. Therefore, this Court has reasoned that a court must apply independent judgment on the ultimate question of preemption, even if it gives an agency's views the weight their reasoning deserves. *See Wyeth*, 555 U.S. at 576 (explaining that Court has "not deferred to an agency's conclusion that state law is pre-empted," but instead has "attended to an agency's explanation of how state law affects the regulatory scheme"). The Court should not accept the Petitioner's invitation to break new ground by deferring under *Chevron*. Instead, it should adhere to an approach that preserves the presumption against preemption and directs the reviewing court to consider

the usual balance of federal and state authority and to take a close look at the quality of the agency's decisionmaking.

Such an approach is consistent with *Skidmore*, 323 U.S. at 140, which directs courts to give weight to an agency's views to the extent they have the "power to persuade."[11] *Skidmore* requires a reviewing court to consider the "thoroughness" and "validity" of an agency's statutory interpretation, as well as its "consistency" with other agency pronouncements. *Id.*

This Court has also required consideration of the quality of agency decisionmaking at *Chevron*'s second step and under hard look review. An agency's interpretation is not authoritative under *Chevron* where it is unreasonable. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). And an agency that has not provided a "reasonable explanation for its action" is an agency whose decisionmaking fails hard look review. *See F.C.C. v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009). This Court should not treat agency preemption as authoritative under *Chevron* without close judicial review of the agency's interpretation or consideration of the presumption against preemption. Instead, as this Court has made clear, its review of an administrative interpretation that "alters the federal-state framework" may be "heightened," *Solid Waste Agency of N. Cook County*,

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[11] *See* Mendelson, Chevron *and Preemption*, *supra*, at 742 ("A court should retain not only the ability to apply the *Rice* presumption against preemption, but also the discretion to take account of an agency interpretation on preemption under a regime such as *Skidmore v. Swift*.").

531 U.S. at 172-73, and that close review should extend to the quality of an agency's decision to preempt state law.[12]

None of the factors that might counsel in favor of judicial deference in preemption cases are present here. The OPM did not consider the presumption against preemption; it did not offer a "nonperfunctory" federalism impact statement; it did not offer any "special expertise in identifying" a policy conflict between state and federal law; it did not have the benefit of comments from state officials; and it did not offer a "limiting principle" on its broadly preemptive interpretation. Young, *Executive Preemption*, *supra*, at 891-92 (discussing these factors as bearing upon judicial deference to an agency's preemptive interpretation). Instead, the OPM's explanation of its rule is little more than *ipse dixit* favoring preemption.

The OPM claimed to consider the federalism impacts of its rule. But it mustered nothing more than a perfunctory statement that its rule "restates existing rights, roles and responsibilities of State, local, or tribal governments." 80 Fed. Reg. at 29,203. This Court's

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[12] *See* William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 Geo. Wash. L. Rev. 1521, 1568 (2009) ("[R]ecent major Supreme Court preemption precedents adopt a level of policy and factual scrutiny consistent with hard look review . . . ."); Galle & Seidenfeld, *supra*, at 2001 (proposing "amalgam of *Skidmore* and hard look review" for agency preemption); Metzger, *Administrative Federalism*, *supra*, at 2105-06 (developing "contextual approach" that would rely on arbitrary and capricious review, "with greater justification perhaps required only in some circumstances").

analysis of Section 8902(m)(1) in *McVeigh* belies the agency's boilerplate. As this Court made clear, Section 8902(m)(1) does not clearly state that state laws concerning subrogation and reimbursement are preempted. 547 U.S. at 697. And the OPM itself recognized that, under existing law, various state courts had concluded that Section 8902(m)(1) did not preempt state regulation of subrogation. In light of this Court's analysis, as well as state courts' analyses, the OPM's conclusion that its rule restated existing law does not warrant deferential treatment.

OPM's hasty interpretation may be explained by its apparent aim to address ongoing litigation about Section 8902(m)(1)'s scope. In its final rule, OPM purported to protect the "subrogation and reimbursement rights" of insurers against "state courts [that] have interpreted ambiguity in Section 8902(m)(1) to . . . allow state laws to prevent or limit subrogation or reimbursement." 80 Fed. Reg. at 29,203. It therefore provided that its rule would apply to pending as well as future cases. *Id.*

Given the litigation that it cited in its rulemaking, OPM was aware that its proposed rule would preempt the ongoing state dialogue about regulation of subrogation. Nevertheless, OPM provided only a 30 day period for comments, *see* 80 Fed. Reg. 29,203, which is half of the 60 day period that Executive Order 13,563 recommended to ensure that regulations are "based . . . on the open exchange of information and perspectives among State, local, and tribal officials" as well as other stakeholders. *See* Exec. Order 13,563, 76 Fed. Reg. 3821, 3821-22 (January 18, 2011). OPM discussed the three comments it received, each from

parties in favor of preemption. But OPM apparently did not have the benefit of views from the states, the National Association of Insurance Commissioners, the National Conference of State Legislatures, or any other organization representing state regulatory interests. OPM's procedures for considering the federalism impacts of preemption is not a model to be encouraged. To the contrary, the Administrative Conference of the United States has recommended that agencies adopt procedures to ensure "timely" consultation with states concerning preemption. *See* Administrative Conference Recommendation 2010-1, 76 Fed. Reg. 81, 83 (Jan. 3, 2011) (recommending "Updated Policies to Ensure Timely Consultation With State and Local Interests Concerning Preemption"); *see* Catherine M. Sharkey, *Inside Agency Preemption*, 110 Mich. L. Rev. 521 (2012) (reviewing mechanisms for federal agencies to consult with state officials during rulemaking process). The predictable result of OPM's failure was a boilerplate federalism impact statement that, contrary to Executive Order 13,132, is conclusory and does not engage state regulatory interests at all. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (August 10, 1999).

Finally, OPM's interpretation is particularly troublesome because it imbues private contractual provisions with preemptive force. As this Court noted in *McVeigh*, FEHBA's preemption provision "is unusual in that it renders preemptive contract terms in health insurance plans." *McVeigh*, 547 U.S. at 697 (citing *Empire Healthchoice Assurance Inc. v. McVeigh*, 396 F.3d at 143-44 (Sotomayor, J.)). This "unusual" provision "warrant[ed] cautious interpretation," *id.*, which OPM failed entirely to do. Instead, after receiving only three comments, each from industry

representatives, OPM gave preemptive effect to insurers' contractual preferences.

In short, OPM failed entirely to consider state regulatory interests when adopting a broadly preemptive interpretation of Section 8902(m)(1). OPM's view of the preemptive scope of the FEHBA is not due deference.

CONCLUSION

The Missouri Supreme Court's decision should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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Appendix A List of *Amici* Law Professors . . . . App. 1

APPENDIX A

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